

43 CFR Part 2

Subpart E--Legal Process: Testimony by Employees and Production of Records

General Information

- 2.80 What does this subpart cover?
- 2.81 What is the Department's policy on granting requests for employee testimony or Department records?

Responsibilities of Requesters

- 2.82 How can I obtain employee testimony or Department records?
- 2.83 If I serve a subpoena or subpoena duces tecum, must I also submit a request under *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)?
- 2.84 What information must I put in my *Touhy* Request?
- 2.85 How much will I be charged?
- 2.86 Can I get an authenticated copy of a Department record?

Responsibilities of the Department

- 2.87 How will the Department process my *Touhy* Request?
- 2.88 What criteria will the Department consider in responding to my *Touhy* Request?

Responsibilities of Employees

- 2.89 What must I, as an employee, do upon receiving a request?
- 2.90 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

General Information

§ 2.80 What does this subpart cover?

(a) This subpart describes how the Department of the Interior (including all its bureaus and offices) responds to requests or subpoenas for:

(1) Testimony by employees in State, territorial or Tribal judicial, legislative or administrative proceedings concerning information acquired while performing official duties or because of an employee's official status;

(2) Testimony by employees in Federal court civil proceedings in which the United States is not a party concerning information acquired while performing official duties or because of an employee's official status;

(3) Testimony by employees in any judicial or administrative proceeding in which the United States, while not a party, has a direct and substantial interest;

(4) Official records or certification of such records for use in Federal, State, territorial or Tribal judicial, legislative or administrative proceedings.

(b) In this subpart, "employee" means a current or former Department employee, including a contract or special government employee.

(c) This subpart does not apply to:

- (1) Congressional requests or subpoenas for testimony or records;
- (2) Federal court civil proceedings in which the United States is a party;
- (3) Federal administrative proceedings;
- (4) Federal, State and Tribal criminal court proceedings;

(5) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the Department. See 5 CFR Secs. 2635.702(b), 2635.807 (b).

(6) Testimony by employees as expert witnesses on subjects outside their official duties, except that they must obtain prior approval if required by Sec. 2.90.

(d) This subpart does not affect the rights of any individual or the procedures for obtaining records under the Freedom of Information Act (FOIA), Privacy Act, or statutes governing the certification of official records. The Department FOIA and Privacy Act regulations are found at 43 CFR Part 2, subparts B and D.

(e) Nothing in this subpart is intended to impede the appropriate disclosure under applicable laws of Department information to Federal, State, territorial, Tribal, or foreign law enforcement, prosecutorial, or regulatory agencies.

(f) This subpart only provides guidance for the internal operations of the Department, and neither creates nor is intended to create any enforceable right or benefit against the United States.

§ 2.81 What is the Department's policy on granting requests for employee testimony or Department records?

(a) Except for proceedings covered by Sec. 2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena. However, if you request in writing, the Department will consider whether to allow testimony or production of records under this subpart. The Department's

policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.

(b) No Department employee may testify or produce records in any proceeding to which this subpart applies unless authorized by the Department under Secs. 2.80 through 2.90 United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951).

Responsibilities of Requesters

§ 2.82 How can I obtain employee testimony or Department records?

(a) To obtain employee testimony, you must submit:

(1) A written request (hereafter a "*Touhy* Request;" see Sec. 2.84 and United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951)); and

(2) A statement that you will submit a check for costs to the Department of the Interior, in accordance with Sec. 2.85, if your *Touhy* Request is granted.

(b) To obtain official Department records, you must submit:

(1) A *Touhy* Request; and

(2) A Statement that you agree to pay the costs of duplication in accordance with 43 CFR Part 2, appendix A, if your *Touhy* Request is granted.

(c) You must send your *Touhy* Request to:

(1) The employee's office address;

(2) The official in charge of the employee's bureau, division, office or agency; and

(3) The appropriate unit of the Solicitor's Office.

(d) To obtain employee testimony or records of the Office of Inspector General, you must send your *Touhy* Request to the General Counsel for the Office of Inspector General.

(e) 43 CFR Part 2, Appendix B contains a list of the addresses of the Department's bureaus and offices and the units of the Solicitor's Office. The General Counsel for the Inspector General is located at the address for the Office of the Inspector General. If you do not know the employee's address, you may obtain it from the employee's bureau or office.

§ 2.83 If I serve a subpoena duces tecum, must I also submit a *Touhy* request?

Yes. If you serve a subpoena for employee testimony, you also must submit a request under United States ex rel. *Touhy v. Regan*, 340 U.S. 462 (1951)? If you serve a subpoena duces tecum for records in the possession of the Department, you also must submit a *Touhy* Request.

§ 2.84 What information must I put in my *Touhy* Request?

Your *Touhy* Request must:

- (a) Identify the employee or record;
- (b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;
- (c) Identify the parties to your proceeding and any known relationships they have to the Department's mission or programs;
- (d) Show that the desired testimony or records are not reasonably available from any other source;
- (e) Show that no record could be provided and used in lieu of employee testimony;
- (f) Provide the substance of the testimony expected of the employee; and
- (g) Explain why you believe your *Touhy* Request complies with Sec. 2.88.

§ 2.85 How much will I be charged?

We will charge you the costs, including travel expenses, for employees to testify under the relevant substantive and procedural laws and regulations. You must pay costs for record production under 43 CFR Part 2, Appendix A. Costs must be paid by check or money order payable to the Department of the Interior.

§ 2.86 Can I get an authenticated copy of a Department record?

Yes. We may provide an authenticated copy of a Department record, for purposes of admissibility under Federal, State or Tribal law. We will do this only if the record has been officially released or would otherwise be released under Sec. 2.13 or this Subpart.

Responsibility of the Department

§ 2.87 How will the Department process my *Touhy* Request?

- (a) The appropriate Department official will decide whether to grant or deny your *Touhy* Request. Our Solicitor's Office or, in the case of the Office of Inspector General, its General

Counsel, may negotiate with you or your attorney to refine or limit both the timing and content of your *Touhy* Request. When necessary, the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, also will coordinate with the Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(b) We will limit our decision to allow employee testimony to the scope of your *Touhy* Request.

(c) If you fail to follow the requirements of this Subpart, we will not allow the testimony or produce the records.

(d) If your *Touhy* Request is complete, we will consider the request under Sec. 2.88.

§ 2.88 What criteria will the Department consider in responding to my *Touhy* Request?

In deciding whether to grant your *Touhy* Request, the appropriate Department official will consider:

(a) Your ability to obtain the testimony or records from another source;

(b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and

(c) Our ability to:

(1) Conduct our official business unimpeded;

(2) Maintain impartiality in conducting our business;

(3) Minimize the possibility that we will become involved in issues that are not related to our mission or programs;

(4) Avoid spending public employee's time for private purposes;

(5) Avoid the negative cumulative effect of granting similar requests;

(6) Ensure that privileged or protected matters remain confidential; and

(7) Avoid undue burden on us.

Responsibilities of Employees

§ 2.89 What must I, as an employee, do upon receiving a request?

(a) If you receive a request or subpoena that does not include a *Touhy* Request, you must immediately notify your supervisor and the Solicitor's Office, or the General Counsel of the Office of the Inspector General, as applicable, for assistance in issuing the proper response.

(b) If you receive a *Touhy* Request, you must promptly notify your supervisor and forward the request to the head of your bureau, division or office. After consulting with the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, the official in charge will decide whether to grant the *Touhy* Request under Sec. 2.88.

(c) All decisions granting or denying a *Touhy* Request must be in writing. The official in charge must ask the applicable unit of the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, for advice when preparing the decision.

(d) Under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44(a)(1), or comparable State or Tribal law, a request for an authenticated copy of a Department record may be granted by the person having the legal custody of the record. If you believe that you have custody of a record:

(1) Consult your delegated authority to determine if you can grant a request for authentication of records; and

(2) Consult the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, concerning the proper form of the authentication (as authentication requirements may vary by jurisdiction).

§ 2.90 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

(a) You must comply with 5 CFR 2635.805(c), which details the authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any judicial or administrative proceeding in which the United States is a party or has a direct and substantial interest. This procedure means:

(1) You must obtain the written approval of your Deputy Ethics Official;

(2) You must be in an approved leave status if you testify during duty hours; and

(3) You must state for the record that you are appearing as a private individual and that your testimony does not represent the official views of the Department.

(b) If you testify as an expert witness on a matter outside the scope of your official duties, and which is not covered by paragraph (a) of this section, you must comply with 5 CFR 2635.802 and 5 CFR 3501.105.